IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 19TH SEPTEMBER 2007 / 28TH BHADRA 1929

Ex.SA.No. 4 of 2007()

AS.88/2006 of SUB COURT, OTTAPPALAM
OS.385/2002 of MUNSIFF COURT, OTTAPPALAM
(EA 262/06 IN EA 856/05 IN EP 365/04)
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: APPELLANT/APPELLANT/IST RESPONDENT

RAMAKRISHNAN,
S/O.PAPPIYIL AMMUKUTTY AMMA,
EZHUVANTHALA POST, VIA NELLAYA,
OTTAPALAM TALUK.

BY ADV. SRI.SANTHEEP ANKARATH

RESPONDENTS: RESPONDENTS/PETITIONER AND 2ND RESPONDENT

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1. GOPI EZHUTHASSAN,
S/O.CHAMI EZHUTHASSAN,
PULLANIKATTIL HOUSE, EZHUVANTHALA POST,
NELLAYA, VIA OTTAPALAM TALUK.

2. C.V.SANKARANARAYANAN,
S/O.GOVINDAN EZHUTHASSAN,
CHELAKATTUTHODI VADAKKEKARA VEETTIL,
EZHUVANTHALA POST, VIA NELLAYA,
OTTAPALAM TALUK.

BY ADV. SRI.T.SETHUMADHAVAN FOR R1
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

THIS EXECUTION SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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Ex.S.A. NO. 4 OF 2007

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Dated this the 19th day of September, 2007

JUDGMENT

Appellant is first respondent in E.A.262/2006 in E.P.365/2004 filed by first respondent decree holder auction purchaser. Second respondent is the judgment debtor. First respondent purchased the property of the second respondent in court auction sale in execution of the decree. After getting sale certificate petition was filed to take delivery of the property. When delivery was ordered, wife of the judgment debtor filed E.A.468/2005 claiming title over the property. That was dismissed. Thereafter, when amin was deputed to effect delivery it was obstructed by appellant contending that as per an agreement for sale entered into with second respondent dated 3.12.199 he is in possession of the property and therefore delivery of possession cannot be taken by dispossessing him. First respondent then filed

E.A.262/2006 under Rule 97 of Order XX1 of Code of Civil Procedure for removal of the obstruction. Appellant filed a counter contending that on 3.12.1999 Ext.B1 agreement was executed by appellant and second respondent whereunder the property sought to be taken delivery by first respondent was agreed to be sold to the appellant for a total consideration of Rs.1,25,000/- and Rs.75,000/- was paid as part of sale consideration. It was contended that thereafter on 18.11.2002 Rs.25,000/- was paid and the period of the agreement was extended and possession of the property was handed over to the appellant and since then appellant has been in absolute possession of the property and he is entitled to get protection provided under section 53A of Transfer of Property Act. It was further contended that he bona fide entered into an agreement for sale obtained possession and therefore is entitled to the protection and he cannot be dispossessed.

2. Learned Munsiff on the evidence of PW1,

RW1, Ext.B1, C1 and CW1 rejected the claim of the appellant holding that he is not entitled to the protection of Section 53A of Transfer of Property Act. Petition was allowed and appellant was directed to be removed from causing obstruction. Appellant challenged the decree and judgment before Sub Court, Ottapalam in A.S.88/2006. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant and first respondent were heard.

4. The argument of learned counsel appearing for appellant is that courts below have gone wrong in rejecting the claim for protection under section 53A of Transfer of Property Act. It was argued that though amended sub section (1-A) of Section 17 of Registration Act, 1908, which came into force only on 24.9.2001, is not having any retrospective effect, courts below applied the provision to Ext.B1 agreement ignoring that it was executed on

3.12.1999 and amended sub section (1-A) of Section 17 has no application at all. It was argued that for that reason the findings of the courts below are unsustainable. Learned counsel also argued that findings of courts below that first respondent is entitled to the benefit of first proviso to Section 53A is also not sustainable as what could be claimed by an auction purchaser is only the right that was with second respondent, judgment debtor on the date of the court auction sale and his right was only for the balance sale consideration payable under Ext.B1 agreement and therefore findings of the courts below are not sustainable. Learned counsel also argued that the question whether Ext.B1 agreement is genuine or not was not gone into by the courts below and Ext.B1 agreement was proved and it was also proved that appellant obtained possession of the property under Ext.B1 and Section 17(1-A) is not applicable to the agreement and therefore appellant is entitled to the protection of Section

53A of Transfer of Property Act, and courts below should not have directed to remove him from causing obstruction when first respondent is not entitled to take delivery of the property by dispossessing the appellant.

5. Learned counsel appearing for first respondent submitted that the fact that the wife of the judgment debtor herself filed an application claiming title and possession to the property earlier which was dismissed by the executing court and fact that existence of the agreement for sale was not mentioned by the judgment debtor at any stage of the suit or execution proceedings and failure of the appellant to contest the insolvency petition filed by second respondent, inspite of notice received by him as admitted at the time of his examination establish that he has no right under Ext.B1 agreement for sale and Ext.B1 agreement was created by second respondent to obstruct the delivery. It was also argued that evidence establish that appellant did not obtain

possession of the property pursuant to Ext.B1 and appeal is only to be dismissed.

6. Ext.B1 agreement is seen executed on 3.12.199. Under sub section (1-A) of Section 17 of the Registration Act, the documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53A of Transfer of Property Act shall be registered if they have been executed "on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001, and if such documents are not registered on or after such commencement, they shall have no effect for the purpose of Section 53A of Transfer for Property Act.As it is specifically provided that registration of the contract, to claim the right provided under section 53A is needed only if the contract was entered into after 24-9-2001 the date of commencement of Registration and Other Related Laws (Amendment) Act, 2001. The section has no retrospective effect. Therefore the amended sub section (1-A)

of Section 17 cannot be applied to an agreement for sale executed before the date of commencement of Registration and Other Related Laws (Amendment) Act,2001. As Ext.B1 was seen executed, the provision is not applicable to Ext.B1. Hence findings of courts below on that aspect is not sustainable.

7. But that does not mean that because of the existence of Ext.B1 agreement, appellant is to be granted protection under section 53A of Transfer of Property Act. In order to claim the benefit under section 53A of Transfer of Property Act, appellant has to establish that he is a person entitled to purchase the property as per an agreement for sale, which is in writing and that in part performance of the agreement he obtained possession of that property and that he is always ready and willing to perform his part of the contract. If any of the said ingredients is not proved, he is not entitled to claim the benefit.

8.Courts below granted the benefit of proviso

to Section 53A to the first respondent holding that he is a bona fide purchaser in court auction sale without notice of any agreement for sale or part performance thereof. The argument of learned counsel appearing for appellant, relying on the decision of this court in **Ramesan v. Abdul Majeed (1987(1) KLT 864)**is that the right of an auction purchaser who purchased the right of a person who entered into an agreement with a third party to sell the property and put him in possession of that property, is only to claim the balance sale consideration payable under the agreement for sale and he has no title to the property. The Division Bench of this court in Ramesan's case (supra) elaborately considered that aspect and held that if on the date of attachment the right of the person, who agreed to sell the property was only to receive the balance purchase money, the attachment would be effective only in regard to that right and a person who on the strength of an earlier agreement to sell

obtained sale deed subsequent to the attachment, after paying entire consideration would hold title to the property subject to the charge in regard to the balance sale consideration and the attachment would be effective only in regard to such balance sale consideration. It was held that the attachment in such a case would not render the subsequent sale void. In the light of the principle, fact that first respondent is an auction purchaser will not make Ext.B1 agreement for sale void and also or will not defeat the right of the appellant to claim benefit under section 53A of Transfer of Property Act, provided he has such a right. Hence the crucial question is whether on the facts of the case, appellant is entitled to the protection of Section 53A of Transfer of Property Act.

9. The deposition of appellant as RW1 was made available. Evidence of appellant conclusively establish that he is not a bona fide purchaser for consideration who obtained possession of the

property pursuant to Ext.B1 agreement for sale. His evidence prove that he did not verify the title deed of second respondent before entering into Ext.B1 agreement. He did not obtain the encumberance certificate and did not verify whether there was any attachment or liability in that property agreed to be purchased. This is not the conduct of an ordinary reasonable human being who enters into an agreement for sale. It is more so because according to appellant he agreed to purchase the property for a total consideration of Rs.1,25,000/- and paid Rs.75,000/- on the date of execution of the agreement for sale and did not obtain possession of the property. What was contended by appellant was that subsequently he paid Rs.25,000/- on 18.11.2002 and obtained possession of that property at that time. According to appellant, even at that time, he did not verify the title deed or find out whether there is any encumberance. It was also admitted by the appellant that though he received a notice in a

petition filed by second respondent to get himself declared an insolvent, he did not approach that court and did not even verify the contents of that petition. All these aspects establish that appellant did not enter into an agreement for sale bona fide and did not obtain possession of the property as claimed. Added to this, as rightly found by first appellate court, notice on the execution petition was served on the judgment debtor in his address in the property sought to be taken delivery of. On these facts and circumstance,it can only be held that appellant did not obtain possession of the property and he was not ready and willing to perform the agreement and so he is not entitled to the protection under Section 53A of Transfer of Property Act.Moreover, what is claimed by appellant was that he obtained possession of property subsequent to the order of attachment passed by the court. In view of Section 64 of Code of Civil Procedure, which prohibits any transfer or delivery of the property attached,

second respondent cannot legally transfer possession of the property to appellant, after the order of attachment. So also by such transfer appellant is not entitled to claim any legal possession of the property or claim the benefit under section 53A of Transfer of Property Act.

There is no merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006